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IN THE
COURT OF APPEALS OF INDIANA

BOBBY EDWARD LEHNER, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 76A03-0609-CR-435
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE STEUBEN SUPERIOR COURT
The Honorable Randy Coffey, Judge
Cause No. 76D01-0601-FC-56

March 29, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Bobby Edward Lehner, Jr. (Lehner), appeals his sentence for Count I, child molesting, a Class C felony, Ind. Code § 35-42-4-3(b), and Count II, vicarious sexual gratification, a Class D felony, I.C. § 35-42-4-5(c)(3).

We reverse and remand with instructions.

ISSUE

Lehner raises two issues on appeal, which we consolidate and restate as the following single issue: Whether the trial court properly sentenced Lehner.

FACTS AND PROCEDURAL HISTORY

On January 19, 2006, the State filed an Information charging Lehner with Count I, child molesting, a Class C felony, I.C. § 35-42-4-3(b), and Count II, vicarious sexual gratification, a Class D felony, I.C. § 35-42-4-5(c)(3). That same day Lehner plead gilty to both Counts. On June 26, 2006, a sentencing hearing was held. The trial court sentenced Lehner to eight years for Count I, child molesting, a Class C felony, and eight years for Count II, vicarious sexual gratification, a Class D felony, to run concurrently.

Lehner now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Lehner claims the trial court improperly sentenced him. Specifically, he contends (1) the trial court erred by imposing an eight year sentence for Count II, vicarious sexual gratification, a Class D felony; and (2) his sentence is inappropriate in light of the nature of the offenses and his character.

Similar to *Oglesby v. State*, 513 N.E.2d 638 (Ind. 1987), *reh'g denied*, *cert. denied*, where the trial court erroneously sentenced Oglesby to a term of ten years imprisonment for robbery as a Class B felony when he had been charged and convicted of robbery as a class C felony, the trial court erroneously sentenced Lehner to a term of eight years imprisonment for vicarious sexual gratification as a Class C felony when he pled guilty to vicarious sexual gratification as a Class D felony. *See Oglesby*, 513 N.E.2d at 641. Thus, the trial court plainly erred on the face of the record in sentencing Lehner as it did on Count II. Accordingly, such error calls for this case to be remanded for correction of judgment and resentencing on Count II for vicarious sexual gratification as a Class D felony. *See id.*

Lehner also argues his eight year sentence is inappropriate in light of the nature of the offenses and his character. Particularly, Lehner claims these offenses are not among the worst offenses as there is no evidence of any resulting physical injury, these offenses were part of a "protracted episode of molestation," and Lehner had health problems. (Appellant's Br. p. 13). Additionally, he argues his character does not warrant a maximum penalty as he has a limited criminal history, plead guilty at his initial hearing, and showed extreme remorse.

Lehner was sentenced under Indiana's new advisory sentencing scheme, which went into effect on April 25, 2005. Under this scheme, "Indiana's appellate courts can no longer *reverse* a sentence because the trial court abused its discretion by improperly finding and weighing aggravating and mitigating circumstances[;]" appellate review of sentences in Indiana is now limited to Appellate Rule 7(B). *McMahon v. State*, 856

N.E.2d 743, 748-49 (Ind. Ct. App. 2006) (emphasis added). Thus, the burden is on the defendant to persuade this court that his or her sentence is inappropriate. *Id.* at 749.

Lehner likens his case to *Buchanan v. State*, 767 N.E.2d 967 (Ind. 2002), where the supreme court found the charged crime of child molesting as a Class A felony did not warrant the maximum sentence when it was committed without excessive physical brutality, the use of a weapon, resulting physical injury, and was not part of a protracted episode of molestation but rather a one-time occurrence. Additionally, Buchanan also suffered from a mental illness; Lehner also suffers from a mental illness. *See id.*

In light of Lehner's character, his criminal history is comprised of three misdemeanor convictions, he plead guilty the same day charges were filed, did not change his plea even after retaining counsel, and expressed extreme remorse.

Thus, in light of the nature of these offenses and his character, we find the maximum sentence is inappropriate. Instead, we revise Lehner's sentence to the advisory sentences for both offenses, *i.e.*, four years for Count I, child molesting, a Class C felony, and one and one half years for Count II, vicarious sexual gratification, a Class D felony years to run concurrently.

CONCLUSION

Based on the foregoing, we find the sentence imposed by the trial court to be inappropriate. Rather, the eight year concurrent sentences for Counts I and II need be replaced by the advisory sentences of four years for Count I, child molesting, a Class C felony, and one and one half years for Count II, vicarious sexual gratification, a Class D felony and all Counts should be run concurrently.

Reversed and remanded with instructions.

KIRSCH, J., and FRIEDLANDER, J., concur.